Petition

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT BENSON PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA and
WILLIAM E. LUCAS, Special Agent,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit err in holding that the service requirements of § 7603 of the Internal Revenue Code of 1954, as amended, which requires that a summons be delivered in hand to an individual or left at his last and usual place of abode, need not be strictly complied with and may be waived in certain circumstances?

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OPINION BELOW

The opinion of the Court of Appeals, dated June 18, 1981, is reported at 648 F.2d 361 and appears in Appendix A of this Petition. The Memorandum Opinion of the United States District Court for the Northern District of Texas is reported at 491 F. Supp. 74 and also appears in Appendix A of this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on June 18, 1981. Motion for Rehearing was denied on August 10, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.) § 7603, provides in pertinent part:

> A summons . . . shall be served by the secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. . . .

The full text of § 7603 is set out in Appendix B of this Petition.

Section 7604 of the Internal Revenue Code of 1954 provides, in pertinent part:

> (a) Jurisdiction of District Court. — If any person is summoned under the Internal Revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States District Court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) Enforcement. — Whenever any person summoned . . . neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. . . .

The entire text of § 7604 is set out in Appendix B of this Petition.

The entire text of Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.) § 301.7603-1 is set forth in Appendix B of this Petition.

STATEMENT OF THE CASE

This is a summons enforcement action wherein the government seeks enforcement against Robert Benson Payne ("Payne") of two Internal Revenue Service summonses dated April 5, 1978 (the "Summonses"), one addressed to Payne as the President of Tower Land and Investment Company ("Tower") and the other addressed to Payne as President of Taurus Corporation ("Taurus"). The United States District Court for the Northern District of Texas (Judge Taylor) ordered that Payne as President of Tower and of Taurus shall obey the Summonses. (R. 63.)[1] The findings and conclusions of the District Court are set forth in its Memorandum Opinion filed on June 16, 1980. (R. 55.) Payne filed a timely Notice of Appeal on July 25, 1980. (R. 64.) The Court of Civil Appeals for the Fifth Circuit affirmed the District Court's decision and Payne now brings his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth District.

The relevant facts, as found by the District Court, are as follows: In or about February, 1978, Special Agent William E. Lucas ("Lucas") of the Internal Revenue Service ("IRS") advised Payne that he was under criminal investigation for failure to file his individual tax returns for the years 1973 through 1976, inclusive. Shortly thereafter, Payne hired Robert L. Trimble ("Trimble") as his attorney to represent him in connection with the criminal investigation being conducted by Lucas. Trimble notified Lucas of his representation and furnished Lucas with a standard IRS Power of Attorney.

On April 5, 1978, the Summonses in question were personally served by Lucas on Trimble. (R. 56.) Payne and

[1] "R" references are to the original record on appeal.

Trimble appeared at the time and place designated in the Summonses and Trimble advised Lucas that Payne would not comply with the Summonses. (R. 56.) This suit followed to enforce that compliance and Payne resisted on the ground that service of the Summonses did not comply with the service requirements of I.R.C. § 7603. The District Court found that the government failed to properly comply with the service requirements of I.R.C. § 7603 because the Summonses were not served upon Payne personally, nor were the Summonses left at Payne's last and usual place of abode, as required by that section. (R. 57.) However, the District Court went on to find that Payne had waived strict compliance with those service requirements by appearing at the time and place set forth in the Summonses and not objecting to the improper service at the time of such appearance. (R. 57.) A Notice of Appeal was filed July 25, 1980, and on June 18, 1981, the Fifth Circuit issued its opinion and a judgment affirming the District Court. Motion for Rehearing was denied on August 10, 1981.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Northern District of Texas had jurisdiction over the enforcement of the Summonses under I.R.C. § 7604(a).

ARGUMENT

THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE SERVICE REQUIREMENTS OF § 7603 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED, WHICH REQUIRES THAT A SUMMONS BE DELIVERED IN HAND TO AN INDIVIDUAL OR LEFT AT HIS LAST AND USUAL

PLACE OF ABODE, NEED NOT BE STRICTLY COMPLIED WITH AND MAY BE WAIVED IN CERTAIN CIRCUMSTANCES.

This case concerns the procedure for the enforcement of Internal Revenue laws and affects thousands of taxpayers who are audited each year. Specifically involved here, is the statutory requirement governing the manner in which the IRS must serve a summons upon a summoned party. Such summonses must be served in express compliance with the provisions of the Internal Revenue Code. This Court has expressed appreciation of such limitation on the IRS's power. *See, United States v. Bisceglia*, 420 U.S. 141, 146 (1975); *United States v. Powell*, 379 U.S. 48 (1964). The presence of such questions necessitates a grant of certiorari. *See, Donaldson v. United States*, 400 U.S. 517, 522 (1971).

I.R.C. § 7603 requires that a summons "shall be served by the secretary or his delegate, by an attested copy delivered in hand to the person it is directed, or left at his last and usual place of abode." Also, see *Treas. Regs.* Section 301.7603-1(a), Appendix B, *infra*, which reiterates Section 7603. The Summonses issued to Payne here were neither personally served nor left at his last and usual place of abode. Rather, they were served upon his attorney. It is apparent, then, that there was not strict compliance with § 7603. The Fifth Circuit found, however, that Payne had waived his right to object to this procedural defect by failing to do so at the meeting between Special Agent Lucas, Mr. Trimble and himself on the return date of the Summonses. The District Court noted that had Payne complained at that time, Lucas could have easily remedied the defective service by immediately serving him personally. Moreover, the District Court recognized that Payne had been accompanied by counsel to advise Payne not to comply with the Sum-

monses on the basis of substantive defenses, while at no time mentioning any procedural deficiencies. Therefore, it held that this failure to object to the service of the Summonses operated as a waiver. (R. 55-57.)

There is no statutory authority for the waiver theory urged by the government and adopted by the District Court and the Fifth Circuit in this case. I.R.C. § 7603 is unequivocal as to the service requirements of an IRS summons and nowhere does the code provide for waiver of compliance with those requirements. Further, to permit the waiver of such, absent affirmative voluntary compliance with the summons itself, would effectively nullify the statute and ignore the due process requirements of the United States Constitution. *See, United States v. Powell*, 349 U.S. 48 (1964), and *United States v. Green*, 546 F.2d 123 (5th Cir., 1977).

In *United States v. Powell*, this Court clearly stated that in order to enforce its summons, the IRS "must show . . . that the administrative steps required by the Code had been followed . . ." 349 U.S. at 58. Further, the legitimacy of an IRS summons must be tested as of the date of its issuance. In *Couch v. United States*, 409 U.S. 322 (1973), this Court held that a transfer of records after service of a Summons was irrelevant and stated that "[t]he rights and obligations of the parties became fixed when the summons was served and the transfer did not alter them." 409 U.S. at 329, n.9. Thus, a summons which is improper on the date when it was served, such as the Summonses in this case, cannot subsequently be made proper and enforceable by the action or inaction of the person to whom it was directed. Rather, a new summons which is valid and enforceable must be issued and properly served by the IRS.

In concluding that a summoned party can irrevocably waive the service requirements of I.R.C. § 7603 by his failure to raise that objection at or prior to the return date of the summons, the District Court and the Fifth Circuit relied solely on the case of *United States v. Myslajek*, 568 F.2d 55 (8th Cir., 1977), *cert. denied*, 438 U.S. 905 (1978). The decision in *Myslajek* gave no authority for its finding other than a cite to the case of *United States v. Gajewski*, 419 F.2d 1088 (8th Cir., 1969), *cert. denied*, 397 U.S. 1040 (1970), which merely applied Federal Rule of Civil Procedure 12(h) in holding that the respondents had waived their personal jurisdiction objection by not timely presenting it by motion or in an answer. Failure to timely make an objection in a judicial proceeding before a court as in *Gajewski* is far different from a summoned party's failure to affirmatively raise each and every objection to his compliance with the summons at the time of an informal meeting with a government agent. Until an answer to the petition was required, Payne surely had no duty to give the IRS gratuitous legal advice on how to serve a summons. Only if he had not raised the objection in his answer would there be a waiver under Rule 12(h). Here, however, Payne did properly and timely object to the improper service in his original answer to the government's petition. (R. 14-15). Neither Rule 12(h) nor *Gajewski* support the government's waiver theory.

I.R.C. § 7604 specifically provides the means by which the government must seek enforcement of an I.R.S. summons. It requires the government to institute a summons enforcement proceeding in the United States District Court. This statutory procedure for summons enforcement by its very nature contemplates that any defense available to a summoned party can and properly should be raised at that time.

This procedure for the government's enforcement of IRS summonses and the summoned party's right to defend against such enforcement was considered and approved by this Court in *Reisman v. Caplin*, 375 U.S. 440 (1964). There, this Court stated:

> "If the secretary or his delegate wishes to enforce the summons, he must proceed under § 7402(b), which grants the district courts of the United States jurisdiction 'by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.'
>
> "Any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness . . ." 375 U.S. at 445-446
>
> * * * * *
>
> ". . . As we read the legislative history, Section 7604(b) remains in this comprehensive procedure provided by Congress to cover a default or contumacious refusal to honor a summons before a hearing officer. But even in such cases, just as in a criminal prosecution under Section 7210, the witness may assert his objections at the hearing before the court which is authorized to make such order as it 'shall deem proper.' § 7604(b).
>
> "Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, *the witness may challenge the summons on any appropriate ground* . . ." (emphasis added) 375 U. S. at 448-449

Thus, according to *Reisman*, the person to whom the summons is directed is simply required to appear before the IRS and in good faith state that he objects to enforcement of the summons, in which event the government must proceed to the district court for enforcement of the summons in accordance with Section 7604. It is clear from *Reisman* that if a person intends to object to a summons, the appear-

ance before the IRS is necessary only to inform the IRS that the person does not intend to comply with the summons and that the summons will have to be judicially enforced. Once the IRS has notice of such person's refusal to obey the summons, it is not necessary that such person raise each and every objection to the summons before the IRS. As stated in *Reisman*, the proper time and place to raise each objection is before the district court.

The procedure called for by Section 7604 and approved by this Court in *Reisman* was followed here. At his first opportunity to appear before a court of competent jurisdiction, Payne properly and timely raised his defenses to the enforcement of the Summonses. (R. 14-15). Therefore, Payne cannot be considered to have waived his rights to object to the improper service of the Summonses.

Both the decisions below and *Myslajek* effectively require a summoned party to set forth every objection to an IRS summons prior to any hearing before a district court. Such a requirement violates a summoned party's procedural due process and further imposes upon him the requirement of judicially establishing his defenses in connection with the summons before a non-judicial governmental agency. This would result in the IRS's usurpation of the power of the courts in connection with a summons enforcement and is clearly contrary to the intent of Congress in enacting Section 7604 and to this Court's holding in *Reisman*.

Neither the Fifth Circuit nor the Eighth Circuit in *Myslajek* give any statutory authority for their holding, and, as pointed out above, there are no provisions within the Code for a waiver of the procedural service requirements of Section 7603. Particularly, there is no statutory requirement that a summoned party raise his objection at an early date

so that defective service could easily be inexpensively cured through a second service. It is not the obligation of a summoned party to cure the defective service, but instead the obligation of the IRS to properly comply with the service requirements in the first place. See, *United States v. Powell*, *supra*.

Plainly, Congress intended that the service requirements of Section 7603 be complied with since there is neither an alternative method for compliance nor a statutory method of waiving such compliance. Congress also intended that all issues involving the rights of government versus the rights of the summoned party be resolved before a federal court in a judicial proceeding instituted in the form of a summons enforcement proceeding. This is precisely the procedure followed in this case. Payne raised his valid objection to the improper service at the very earliest time as provided by the statute and in so doing has not waived that objection.

The Fifth Circuit cited *United States v. Bank of Moulton*, 614 F.2d 1063 (5th Cir., 1980), as a precedent to ignore procedural deficiencies in a summons enforcement action. The *Bank of Moulton* case provides that the court must "evaluate the seriousness of the violation under all circumstances, including the government's good faith and the degree of harm imposed by the unlawful conduct." *Id.* at 1066.

However, the *Bank of Moulton* did not involve the failure, as here, of the government to follow the plain language of the law. Failure to require the IRS to obey the law should not be considered as having been waived absent an express waiver and voluntary compliance. Payne has been prejudiced here in that he must comply with an improperly served summons.

In Section 7602, Congress entrusted the IRS with broad summons power for use in civil tax investigations. An agent may summon "any person [he] may deem proper" to appear at the time and place of the agent's choice and to produce and give sworn testimony "as may be relevant or material to such inquiry." This Court has recognized the encompassing sweep of this summons power, and that "such investigations unquestionably involve some invasion of privacy." *United States v. Bisceglia*, 420 U.S. at 146.

In *Bisceglia*, the Court further stated,

> "We recognize that the authority invested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation, thus shifting heavy burdens to honest taxpayers. Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts. 26 USC Section 7604(b); *Reisman v. Caplan*, 375 US 440 (1964). Once a summons is challenged, it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harrass the taxpayer or to put pressure on him to settle or collect an old dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell*, 379 at 58. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons. *Id.* at 146.

CONCLUSION

As acknowledged in *Bisceglia*, both this Court and Congress have recognized the necessity of imposing restrictions on the inquisitorial power of the IRS. Such a restriction is at issue here — the statutory prescription of the manner of service of a summons. Failure of the courts below to apply those restrictions demand this Court's review. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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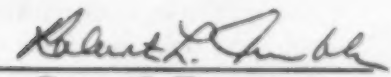
By: 

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APPENDICES

APPENDIX A

UNITED STATES OF AMERICA and
WILLIAM E. LUCAS, Special Agent,
Petitioners-Appellees,

v.

ROBERT BENSON PAYNE, as President of Tower Land
and Investment Company and as
President of Taurus Corporation,
Respondent-Appellant.

No. 80-1890
Summary Calendar

United States Court of Appeals,
Fifth Circuit.
Unit A

June 18, 1981.

Before BROWN, POLITZ and TATE, Circuit Judges.
JOHN R. BROWN, Circuit Judges:

An Appearance Is Made

The material facts are easily summarized in this appeal from the enforcement of two Internal Revenue Service (IRS) summons. On April 5, 1978, William E. Lucas, a special agent of the IRS, personally served two summons on attorney Robert L. Trimble which were addressed to Trimble's client Robert Benson Payne as the President of Tower Land and Investment Company and Robert Benson Payne as the President of Taurus Corporation. The summons directed Payne to appear before Lucas and produce certain records of the two corporations in connection with an investigation of Payne's tax liability for the years 1973 through 1976. Payne and Trimble both appeared at the designated time and place, but failed to comply with the

summons. The Government brought suit to enforce compliance. In answering this complaint, Payne raised, for the first time, the allegation that the summons were invalid and unenforceable because they were not properly served in accordance with 26 U.S.C.A. § 7603[1]— neither served upon Payne personally nor left at his last and usual place of abode.

The District Court, 491 F.Supp. 74, acknowledged that the service was defective, but went on to find that Payne had waived strict statutory compliance by appearing at the time and place set forth in the summons and by failing to object to the improper service at that time. It is from this finding that Payne now appeals.

Silence Is Not Golden — Waiver

It is apparent from the facts that the IRS failed strictly to comply with the service requirements of § 7603 of the IRS code. Therefore, in order to determine the propriety of the District Court's decision enforcing the summons, we must examine that Court's resolution of the issue of whether or not there can be a waiver of strict compliance. In answering this issue in the affirmative, the District Court relied on the only case which has addressed the issue of waiver of service — *U. S. v. Myslajek*, 568 F.2d 55 (8th Cir. 1978) *cert. denied*, 438 U.S. 905, 98 S.Ct. 3123, 57 L.Ed.2d 1147 (1978), which holds that the failure to object to a defective service may constitute waiver of strict compliance

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[1] 26 U.S.C.A. § 7603 (1954):

> A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

with the service requirements of § 7603. There, the IRS agent served two summons upon taxpayer Myslajek's adult son at her place of business and, in addition, notified her by phone. The taxpayer appeared on the return date of the summons, but declined to testify or produce any of the requested documents. Rather, she lodged several substantive objections to the summons, none of which included defective service. Myslajek's procedural objection did not surface until almost three months later in her answer to the enforcement petition. The Eighth Circuit in response held:

> The record demonstrates that Ms. Myslajek received actual notice of the summons on the day they were served but did not object to the defective service until almost three months later. Although she filed a statement objecting to the summons on substantive grounds, she did not take that opportunity to raise any procedural issue. Had she voiced her objections at an earlier date, any defect in service could easily and inexpensively have been cured through a second service. Under the special circumstances of this case, we hold that Ms. Myslajek waived strict compliance with the requirements of § 7603.

Myslajek, 568 F.2d at 57.

The facts in the present case are parallel to those of *Myslajek*. Obviously, taxpayer Payne received notice of the service of the summons as indicated by his appearance, along with that of Trimble, his attorney. Likewise, a substantive objection was made at this time to the summons, but at no time was a procedural deficiency mentioned.[2]

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[2] "Petitioner Lucas testified as follows upon questioning by Mr. Kenneth J. Mighell, United States Attorney for the Northern District of Texas, starting at line 17:

"Q. On the date indicated in the summons, April 24, 1978, did Mr. Payne appear?

"A. Mr. Payne along with Mr. Trimble did appear in the office in Fort Worth.

"Q. What transpired at that time?

"A. At that time they indicated that they were — Mr. Trimble said he was going to suggest Mr. Payne take his Fifth Amendment rights and not comply with the summons or not give us information at that time.

Had there been an objection to the defect, as was emphasized by the *Myslajek* court and the District Court here, the defect could instantly have been cured. Because there was no immediate complaint, however, we arrive at the same logical, expedient and simple conclusion as in *Myslajek*, by finding that under these circumstances, Payne waived strict compliance.

Summons Are Valid

Payne attempts to defeat this finding of waiver with the argument that his objection to the improper service was *properly* and *timely* raised at the District Court's enforcement proceeding. *See* 26 U.S.C.A. § 7604[5]. A requirement that the summoned party raise all defenses before the hearing examiner instead of the District Court, would, asserts Payne, result in a denial of due process and the usurption of power which Congress has granted to the Courts. Furthermore, this procedure is contrary to the steps outlined by the Supreme Court for summons enforcement proceedings in *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). *Powell* clearly states

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"Q. Did Mr. Payne produce any records at that time?
"A. No sir, he did not.
"Q. Did he offer any testimony at that time?
"A. No sir, he did not."

[5] 26 U.S.C.A. § 7604 (1954):

(a) Jurisdiction of District Court — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, records, or other data.

(b) Enforcement — Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district

that in order to enforce its summons, the IRS must show that all administrative steps required by the code have been followed. Thus, Payne maintains that under *Powell*, improper service would result in a denial of enforcement.

We answer Payne's contention with a recent Fifth Circuit case, *United States v. Bank of Moulton*, 614 F.2d 1063 (5th Cir. 1980) which concluded that

> *Powell* did not hold that infringement of any code requirement would operate as a per se bar to enforcement of the IRS summons absent material harm . . . . Nothing in the language of the code itself mandates this sanction for infringement. The correct approach for determining whether to enforce a summons requires the court to evaluate the seriousness of the violation under all the circumstances including the government's good faith and the degree of harm imposed by the unlawful conduct.

Moulton, 614 F.2d at 1066.

Analyzing the present situation in light of this legal principle, we conclude that the instant violation of improper service was, at most, technical and not serious. More importantly, we have not discerned any bad faith on the part of the Government or harm or prejudice to the taxpayer Payne. Since these elements are lacking here, we find no reason for not affirming the District Court's finding of waiver and subsequent enforcement of the summons.

AFFIRMED.

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within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish each person for his default or disobedience.

UNITED STATES OF AMERICA and WILLIAM E. LUCAS, Special Agent

v.

ROBERT BENSON PAYNE, as President of Tower Land & Investment Company and as President of Taurus Corporation.

No. CA 3-78-1287-C.

United States District Court, N. D. Texas, Dallas Division.

June 16, 1980.

MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., District Judge.

The United States and its Agent, Mr. Lucas, seek to enforce two summons under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954.[1] The two summons, dated April 5, 1978, direct Respondent to appear and produce records of two corporations, Tower Land and Investment Company and Taurus Corporation.

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[1] § 7402(b) reads:

(b) To enforce summons — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data [, and]

§7604(a) reads:

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

The two summons were not served upon Respondent personally; nor were they left at "his last and usual place of abode . . ." as required by § 7603 of the Internal Revenue Code of 1954[2] They were served on Respondent's attorney, Mr. Robert Trimble. Respondent and Mr. Trimble did appear as directed by the summons. But Respondent produced no records and did not testify upon the advice of Mr. Trimble.[3]

Respondent resists enforcement of the summons on three grounds. They are stated in his *Brief* of May 14, 1980, at 1 as:

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[2] § 7603 reads:

> A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[3] The only evidence in the record as to what occurred on that day appears at 6 and 7 of the *Transcript of the Hearing on Petition to Enforce Internal Revenue Service Summons*, held on December 4, 1978.

Petitioner Lucas testified as follows upon questioning by Mr. Kenneth J. Mighell, United States Attorney for the Northern District of Texas, starting at line 17:

> Q. On the date indicated in the summons, April 24, 1978, did Mr. Payne appear?
>
> A. Mr. Payne along with Mr. Trimble did appear in the office in Fort Worth.
>
> Q. What transpired at that time?
>
> A. At that time they indicated that they were — Mr. Trimble said he was going to suggest Mr. Payne take his Fifth Amendment rights and not comply with the summons or not give us information at that time.
>
> Q. Did Mr. Payne produce any records at that time?
>
> A. No sir, he did not.
>
> Q. Did he offer any testimony at that time?
>
> A. No sir, he did not.

1. Neither Summons was served in the manner required by Section 7603 of the Internal Revenue Code.

2. The Summonses seek information already in the possession of the Government delivered to it pursuant to summonses issued on August 23, 1977.

3. The Summonses were issued in bad faith and solely for purposes of furthering criminal prosecution against Robert B. Payne and not for civil purposes.

Each contention will be dealt with in turn.

1.

There is no doubt but that § 7603 of the Internal Revenue Code of 1954 was not strictly complied with. So there are two legal issues which must be decided. First, is strict compliance required? Second, can strict compliance be waived by the summoned party?

The only case in point is *United States v. Myslajek*, 568 F.2d 55 (8th Cir. 1977) which answered both questions affirmatively. *Myslajek* is not, of course, precedent in this circuit. Petitioners say the first question should be answered in the negative in this circuit, and, Respondent says that the second question should be answered in the negative.

This Court concludes that the Eighth Circuit panel was correct and is therefore left with a question of fact as to Respondent's waiver of strict compliance.

The only testimony before the Court that is pertinent is quoted in footnote 3. It is clear that Respondent refused to produce documents or to testify on substantive grounds, not procedural grounds. This is square with the situation in *Myslajek*, so Respondent waived the procedural defect. As the Eighth Circuit held, at 57, Petitioner Lucas could have immediately remedied the procedural defect by serving Respondent personally, if complaint had been made then. It should also be noted that Respondent was accompanied by counsel who apparently spoke for Respondent at the time when compliance with the summons was refused.

2.

Respondent contends that the United States has the summoned documents in its possession so it cannot seek them again because of the Supreme Court's ruling in *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) that duplicate information may not be sought.

Respondent was served with two summons on August 23, 1977, by Special Agent Garry W. Parrish of the Memphis, Tennessee Office of the Internal Revenue Service. These summons were substantially complied with on September 9 and 10, 1977. At that time, certain documents were copied by Special Agent Parrish or Petitioner Lucas, at Parrish's direction. Counsel for the Parties have stipulated to a list which is a compilation of the items sought in the April 5, 1978, summons which both Special Agent Parrish and Petitioner Lucas have testified are not in their respective possessions.

Respondent does not contend that any other agent or agency of the United States has these documents in his, her or its possession. Therefore, as to the stipulated documents, Respondent's second contention must fail.

3.

When Special Agent Parrish summoned Respondent in August of 1977, he told Respondent and Respondent's counsel that neither the corporations nor Respondent were then under investigation. At that time though, Parrish had reason to believe that Respondent had not filed income tax returns as required by the Internal Revenue Code of 1954. He had sent an inquiry to the Regional Service Center which covers the area in which Respondent resides and received back a report that there were no returns on file that Respondent had made. This information was conveyed to Petitioner Lucas.

Respondent contends that this shows bad faith on the part of the government.[4] This Court disagrees. This is an insufficient showing of bad faith or trickery or deceit.

[4] See *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978).

Petitioner Lucas had sent his own inquiry as to returns made by Respondent on August 16, 1977, after being apprised by Special Agent Parrish of the results of his inquiry. He received the same negative reply on September 26, 1977, a date subsequent to the compliance with the Parrish summons by Respondent.

It is true that either Special Agent Parrish gave Petitioner Lucas a copy of the microfilm of the documents that were copied either on September 9 or 10, 1977, or sometime in the fall of 1977. But these were the documents that Parrish wanted in his investigation of another taxpayer. Some of the documents microfilmed did pertain to Respondent but were legitimately copies for use in the investigation of the other taxpayer. They were needed, as Special Agent Parrish testified, so that a comparison could be made of the financial transactions between the other taxpayer and the two corporations and the transactions between another individual, Respondent, who stood in the same relationship to the corporations as the other taxpayer.

Also, Petitioner Lucas was not formally assigned to the investigation of Respondent until February, 1978, and a Revenue Agent, with only civil responsibilities, was assigned to the investigation in March, 1978.

Besides there being no bad faith on the part of the United States as required by *LaSalle*, supra, it must be remembered that the documents summoned are not Respondent's documents. They are the records of the corporations. Respondent has not contended that they are anything other than the records of the two corporations. Therefore, Respondent can make no objection to producing them on Fifth Amendment grounds.[5]

As all three of Respondent's contentions fail and Petitioners have shown themselves to be entitled to enforcement of the summons, judgment will be entered enforcing the summons.

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[5] *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944).

U.S. DISTRICT COURT
Northern District of Texas
FILED

JUL 1 1980

Joseph McElroy, Jr., Clerk
By /s/ GASKILL
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-78-1287-C

UNITED STATES OF AMERICA AND
WILLIAM E. LUCAS, Special Agent

VS.

ROBERT BENSON PAYNE, as President of
Tower Land and Investment Company and as
President of Taurus Corporation

JUDGMENT

On December 4, 1978, this cause came on to be heard on the order to show cause issued herein on October 19, 1978, and whereupon appeared the Petitioners and the Respondent and the Court having heard the testimony and argument of the parties and in accordance with its Memorandum Opinion dated June 16, 1980, finds that the summonses which are the subject matter of this action are enforceable against the Respondent, Robert Benson Payne, as President of Tower Land and Investment Company and as President of Taurus Corporation.

It is therefore ORDERED, ADJUDGED and DECREED that the Respondent shall obey the summonses and that the Respondent shall produce all of the books and records sought by the summonses not presently in the possession of the Internal Revenue Service at such time and place as hereinafter may be fixed by the Petitioner, Special Agent William E. Lucas, or any other proper officer of the Internal Revenue Service and that the Respondent shall appear for the purpose of producing such books and records in accordance with said summonses as modified hereby.

It is FURTHER ORDERED, ADJUDGED and DECREED that all costs of suit shall be taxed against the Respondent, Robert Benson Payne.

July 1, 1980.

/s/ W. M. TAYLOR, JR.
United States District Judge

U.S. Court of Appeals
FILED
Aug 10 1981
Gilbert F. Ganucheau
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1800

UNITED STATES OF AMERICA and
WILLIAM E. LUCAS, Special Agent,

Plaintiffs-Appellees,

versus

ROBERT BENSON PAYNE, ETC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 18, 1981, 5 Cir., 198..., ...F.2d.....).
(August 10, 1981)

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
United States Circuit Judge

Clerk's Note:
See Rule 41 FRAP and Local Rule 17 for stay of the mandate

APPENDIX "B"

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

* * * * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the appli-

cation, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Treasury Regulations on Income Tax (1954 Code) 26 C.F.R.):

§ 301.7603-1 Service of summons

(a) In general. A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records or other data are described with reasonable certainty.

(b) Persons who may serve a summons. The officers and employees of the Internal Revenue Service whom the Commissioner has designated to carry out the authority given him by § 301.7602-1(b) to issue a summons are authorized to serve a summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602.

Opposition

Office-Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-492

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT BENSON PAYNE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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ROBERT BENSON PAYNE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below ordering enforcement of two Internal Revenue summonses issued to him but served on his attorney. He contends that the service upon his attorney did not meet the requirements of Section 7603 of the Internal Revenue Code of 1954 (26 U.S.C.) that a summons be served personally or be left at one's last and usual place of abode, and that these statutory requirements cannot be waived.

The pertinent facts may be summarized as follows: On April 5, 1978, William E. Lucas, a Special Agent of the Internal Revenue Service, served two summonses directed to petitioner on his attorney, Robert L. Trimble (I-R. 36-37).[1] Prior to this time, Trimble

[1] "I-R." refers to the original record on appeal as repaginated by the clerk of the district court and transmitted to the court of appeals. "II-R." and "III-R." references are to the transcripts of the proceedings in the district court.

had informed Agent Lucas of his representation of the petitioner and had furnished Lucas with the standard Internal Revenue Service power of attorney (III-R. 36). The summonses required petitioner to appear before Lucas and produce for examination certain records of Tower Land and Investment Company and Taurus Corporation, in connection with an investigation conducted by Lucas into petitioner's correct income tax liability for the years 1973 through 1976 (I-R. 36-37). Petitioner and Trimble subsequently appeared as directed by the summonses but petitioner refused to testify or produce the books, records, and other documents demanded therein (I-R. 28). The only excuse offered for the noncompliance with the summonses was the advice by Trimble to petitioner that he claim his Fifth Amendment privilege against self-incrimination (I-R. 56; III-R. 6-7).

As a consequence of this refusal to comply, the United States and Agent Lucas brought this action in the United States District Court for the Northern District of Texas to enforce the summonses (I-R. 26-29). In response, petitioner alleged, for the first time, that the summonses were invalid and unenforceable because they were not served upon him personally nor left at his last and usual place of abode, in accordance with Section 7603 of the Internal Revenue Code. The district court found that the service of the summonses was not made in strict compliance with Section 7603. 491 F. Supp. 74 (N.D. Tex. 1980). The court nevertheless held that the petitioner had waived this procedural defect by appearing at the time and place prescribed in the summonses and failing to object at that time. The court of appeals affirmed, finding that the violation was, at most, technical and not serious, and further that there was no bad faith on the part of the gov-

ernment or prejudice to petitioner resulting from service upon his attorney (Pet. App. A3-A5).

The decision below correctly held that the Internal Revenue Service's failure to serve the summonses on petitioner personally or to leave them at his last and usual place of abode did not render the summonses unenforceable because petitioner waived his objection to the form of service. The record shows that petitioner had notice of the summonses, as is demonstrated by his appearance, along with his attorney, at the time and place specified. Although petitioner raised substantive defenses to the summonses,[2] he did not object to any deficiency in service. It is apparent that had petitioner complained of improper service at that time, the defective service easily could have been remedied by immediate personal service on petitioner. The logical conclusion therefore is that petitioner waived strict compliance with the requirements of the statute. *United States* v. *Myslajek*, 568 F.2d 55 (8th Cir. 1977). See also *Rife* v. *Commissioner*, 356 F.2d 883, 886 (5th Cir. 1966); *United States* v. *O'Connor*, 237 F.2d 466, 476 (2d Cir. 1956).

A crucial consideration in examining the question of proper service of a summons is the sufficiency of notice to the party to whom the summons is directed. *Daly* v. *United States*, 393 F.2d 873, 876 (8th Cir. 1968). Petitioner at no time raised the issue of lack of sufficiency of the notice. Nor does he attempt to show that his rights have been jeopardized or prejudiced in any meaningful way. *United States* v. *Gajewski*, 419 F.2d 1088, 1092 (8th Cir. 1969), cert. denied, 397 U.S. 1040 (1970). He nevertheless asserts (Pet. 6-7) that the finding of a waiver effec-

[2] As we have indicated, petitioner did raise Fifth Amendment objections to the summonses at his appearance before Agent Lucas.

tively nullifies the statute and ignores the due process requirements of the Constitution, contending that the first opportunity he had to assert any defenses arose in the summons enforcement proceeding initiated in the district court. See Section 7604 of the Code.

Contrary to petitioner's suggestion (Pet. 5), the infringement of any Internal Revenue Code requirement, no matter how insubstantial, does not operate as a per se bar to enforcement of a summons. *United States* v. *Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980). As the court of appeals properly noted (Pet. App. A5), there was no bad faith on the government's part here. Furthermore, petitioner, who had actual notice of the summonses, failed to demonstrate any prejudice whatsoever from his not having been personally served.[3] Accordingly the decision below properly ordered the summonses enforced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1981

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[3] Moreover, the existence of a valid power of attorney makes petitioner's claim particularly inappropriate. Agent Lucas' testimony indicates that it is the policy of the Internal Revenue Service to deal with the taxpayer's representative once a power of attorney is executed (III-R. 36). See I *Internal Revenue Manual—Audit* (CCH) ¶ 4055.21(4), at 7036 (1977 ed.). By virtue of the power of attorney, petitioner had given Trimble authority to act on his behalf. Trimble therefore had the authority to accept service of the summonses on behalf of petitioner. See *United States* v. *Ojala*, 544 F.2d 940, 946 (8th Cir. 1976); *United States* v. *O'Connor*, 433 F.2d 756, 757 (1st Cir. 1970).

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